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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE FOR THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus Washington Legal Foundation addresses the following questions:

1. Whether assessments under the Coal Act, which require Eastern to bear substantial costs to address a benefit shortfall to which it has not contributed, are a compensable taking.

2. Whether due process is violated by retroactive legislation that imposes massive costs on Eastern based on conduct that occurred decades earlier, absent a showing that there is a direct and proportionate causal link between Eastern's conduct and the harm addressed by the legislation.

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BRIEF AMICUS CURIAE FOR THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF THE AMICUS[1]

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF devotes

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[1] Pursuant to Supreme Court Rule 37.6, amicus represents that no counsel for either party authored this brief amicus curiae, either in whole or part. Furthermore, no persons or entities other than amicus curiae, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

substantial resources promoting private property rights and due process for businesses by publishing on these subjects through WLF's Legal Studies Division and by participating in related litigation. WLF has appeared as amicus curiae in a number of cases challenging the constitutionality of legislation under the Due Process and Takings Clauses of the Fifth Amendment which are relevant to this case. *See, e.g.*, *United States* v. *Carlton*, 512 U.S. 26 (1994); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Ehrlich* v. *City of Culver City*, 50 Cal. Rptr. 2d 242 (Sup. Ct.), cert. denied, 117 S. Ct. 299 (1996); *Golden Gate Hotel Ass'n* v. *San Francisco*, 864 F. Supp. 917 (N.D. Cal. 1993), vacated, 18 F.3d 1482 (9th Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994); and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

WLF believes that it can bring a broader perspective to this case than the parties and that its brief will complement the brief of the petitioner and be of material assistance to this Court in deciding the issues in this case. The consents of the parties to the filing of this brief have been filed with the Clerk.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the Petitioner's brief. In brief, Eastern Enterprises ("Eastern") has not mined coal since 1965, when it transferred its coal business to an independent, fully-capitalized subsidiary. Eastern has not signed a coal wage agreement since that time. None of the wage agreements to which Eastern was signatory guaranteed lifetime health benefits for enrolled miners and their families.

Beginning years after Eastern left the coal mining industry, other members of the industry promised lifetime health benefits. As it turned out, they could not live up to

those promises. Nearly three decades after Eastern left the coal mining business, Congress told Eastern that it must step in and make good the promises of lifetime benefits made by *other* companies. Pursuant to the apportionment scheme Congress adopted in the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706 (the "Coal Act"), Eastern has already been assessed over $5 million—and has a projected total liability in excess of $100 million—to cover the health care expenses of some 1,400 coal miner retirees and their beneficiaries.

SUMMARY OF ARGUMENT

Retroactively forcing Eastern to bear these massive costs, absent any showing of a real causal nexus between Eastern's conduct and the harm addressed by the Coal Act, violates both the Takings Clause and the Due Process Clause of the Fifth Amendment.

This Court's Takings Clause jurisprudence firmly establishes that a government-imposed forfeiture of private property rights, for the purpose of providing a benefit to the public at large or to a politically favored group, would constitute a compensable taking if the burdened property owner neither caused nor contributed to the conditions that gave rise to the need for the benefit. The record here establishes that Eastern was in no way responsible, directly or indirectly, either for the promises of lifetime benefits made to coal workers long after Easter left the industry or for the benefits shortfall that led Congress to enact the Coal Act. Given the lack of any causal nexus, the huge size of the assessments, and Eastern's reasonable expectations when it left the coal industry that it would not be required to fund later-promised retirement benefits, the Coal Act assessments amount to a taking.

The Due Process Clause requires heightened rationality review (at least) where—as in this case—retroactive

legislation overturns settled expectations and interferes with rights to private property. To survive searching rationality review, there must be a causal relationship between the conduct of the burdened party and the problem addressed by the governmental action. Because there is no causal connection here, the Coal Act assessments against Eastern violate due process.

ARGUMENT

I. REQUIRING EASTERN TO PAY MILLIONS OF DOLLARS TO MEET A BENEFIT SHORTFALL FOR WHICH IT BEARS NO RESPONSIBILITY IS A COMPENSABLE TAKING

The Takings Clause prohibits the government from taking private property for public use without the payment of just compensation, and thus "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Amazingly, the court of appeals dismissed the text of the Takings Clause and the much-cited *Armstrong* gloss as "rhetorical flourishes." It shrugged off the government's exaction of $100 million from Eastern to cure a benefit shortfall for which Eastern is in no way responsible as an unremarkable readjustment of economic burdens. Pet. App. 19. But this Court has rejected the notion that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). The Framers wrote the Takings Clause not as a "rhetorical flourish" but to guard against the very type of oppressive governmental conduct that Eastern challenges here. However laudable the goal of ensuring health benefits for coal retirees, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the

change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922).

A. It Is A Taking To Require Eastern To Pay Huge Sums To Solve The Problem Of Funding Coal Retiree Health Benefits, Where Eastern Neither Caused Nor Contributed To That Problem

The Takings Clause is a safeguard against governmental appropriation of the property of private parties to benefit society as a whole or other private parties that the government favors. The Takings Clause does not prevent governmental regulation, but subjects it "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). Thus, a primary exception to the availability of compensation for regulatory takings—dictated by "justice and fairness"—is where the owner's use of his property has caused or contributed to the social problem at which the regulation is directed. The Court's recent cases establish that this causation principle is fundamental to takings analysis.

In *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), lack of causation was central to this Court's holding that the state took private property when it conditioned the grant of a building permit on homeowners' willingness to cede a lateral easement across their beachfront lot. The lack of any nexus between the easement and the problems that might result from the proposed construction transformed what otherwise might be permissible land use regulation into an unconstitutional taking. The Court found it "impossible to understand" how the state's condition would remedy any of the problems that the state alleged would be "*caused by* construction of the Nollans' new house." *Id.* at 838-839 (emphasis added). Further, the Court noted, the state's action likely would violate the Takings Clause "[i]f the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not

contributed to it more than other coastal landowners." *Id.* at 835-836 n.4.

In other words, the larger house with which the Nollans proposed to replace their small bungalow would not cause or exacerbate the problem that the state sought to remedy —inadequate lateral beach access. Poor lateral access may well have been a real problem, but it was caused by other factors, such as historical zoning patterns and the fact that so many visitors wished to enjoy a limited resource. The Nollans' proposed new house could not possibly affect the difficulties of lateral access experienced by people already walking along the public beach behind their house. Perhaps it would prove an obstacle for people driving along the street in front of the Nollans' house, but the state's imposed easement would not have remedied that problem. In sum, the fact that the Nollans were not responsible for the harm the state sought to remedy played a significant part in the Court's ruling that they were entitled to just compensation.

This Court elaborated on the integral role that causation plays in takings analysis in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* emphasized the importance of state nuisance law—which focuses on the public harm *caused by* the use of private property—in determining whether a property owner constitutionally must be compensated for a regulatory invasion of his property rights. *Id.* at 1029-1031 (application of state nuisance law entails analysis of the harm "posed by the claimant's proposed activities"). The Court recognized that government may impose burdens on property if the owner's use of the property *causes* severe burdens to others. The Court illustrated this point by explaining that (i) denial of a landfill permit to the owner of a lake-bed would not be a taking where the landfill would cause flooding of others' land, and (ii) an order to a nuclear plant owner to remove improvements upon discovery that the plant sits astride an earthquake

fault would not be a taking because the position of the improvements *contributed to* a threat of great public harm. *Ibid.*

Dolan v. *City of Tigard* reinforces the teaching of *Nollan* and *Lucas* that absent a causal link between the owner's use of the property and the challenged governmental action, the owner of burdened property has a claim for just compensation. In *Dolan*, the city conditioned its approval of Mrs. Dolan's proposal to expand her hardware store on her dedication of part of her property for a greenway that would improve flood and traffic control. Lack of any demonstrated causal connection between Mrs. Dolan's planned use of her property and the government's regulatory purpose was the dominant factor in this Court's ruling that Tigard may have taken Mrs. Dolan's property.

First, the Court explained, the government may not condition issuance of a building permit on the owner's dedication of property without compensating the owner "where the property sought has little or no relationship to the benefit." 512 U.S. at 385. Second, there must be an "essential nexus" between the public use and the government's action. *Id.* at 386. Third, there must be a "rough proportionality" in nature and extent between the exaction on the property owner and "the impact of the proposed development." *Id.* at 391. Applying these principles, the Court agreed with Mrs. Dolan that the city had not met its burden to quantify the burdens "*created by* her new store" or "the required reasonable *relationship*" that would justify the required dedication. *Id.* at 386, 394-395 (emphasis added). The Court emphasized this point by noting that there would have been no taking if Mrs. Dolan's expansion were the cause of the city's shortage of greenway space: "If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative

greenway space for the public either on her property or elsewhere." *Id.* at 394.

These cases establish that a government-imposed forfeiture of an owner's property rights for the purpose of providing a benefit to society at large or to a favored group may be a taking if the property owner did not cause or contribute to the need for the benefit. See also *Pennell* v. *City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting) (requiring "a cause-and-effect relationship" between the governmental imposition and "the social evil" it sought to remedy; where "the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly"); see generally Jan G. Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997).

This principle explains why Eastern's case is distinct from the Court's withdrawal liability cases relied on by the court of appeals. In *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), it was the employers' conduct—their withdrawal from multiemployer pension funds—that triggered the challenged applications of the Multiemployer Pension Plan Amendments Act and thus *caused* the harm that the statute sought to correct. Because the employers had contributed to the problem addressed by the imposed liability—the rescuing of troubled pension plans—the "fairness and justice" principle articulated in *Armstrong* did not require the public as a whole to shoulder the responsibility of curing it. See *Connolly*, 475 U.S. at 227. In contrast, imposition of retroactive liability on parties that had never agreed to ensure full funding of benefits, "without regard to the extent of a particular employer's *actual responsibility*," would have been a taking. *Id.* at 230-231 (O'Connor, J., concurring) (emphasis added).

Unlike the First Circuit in this case, many lower courts, especially recently, have adhered to the Court's requirement of a causal relationship between the social harm sought to be remedied and the government imposition on property rights. *E.g.*, *Aladdin, Inc.* v. *Black Hawk County*, 562 N.W.2d 608, 615 (Iowa 1997) (requiring a landowner to pay for environmental cleanup costs before it is determined whether the landowner is responsible for the contamination is a taking without just compensation); *Ehrlich* v. *City of Culver City*, 50 Cal. Rptr. 2d 242, 261 (Sup. Ct.) (imposition of an impact fee may be a taking where there is an insufficient link between the fee and the problem caused by the burdened development), cert. denied, 117 S. Ct. 299 (1996); *Manocherian* v. *Lenox Hill Hosp.*, 618 N.Y.S.2d 857, 862-863 (Ct. App. 1994) (a statutory requirement that property owners renew the leases of nonprivate hospitals, where the owners did not cause the social harm addressed by the statute, was a taking), cert. denied, 514 U.S. 1109 (1995). And courts have found it constitutionally impermissible to target particular property owners to resolve the problems of low-income persons who cannot afford basic necessities, such as housing or medical care, where the owners did not cause or contribute to those problems. *E.g.*, *Aspen-Tarpon Springs Ltd. Partnership* v. *Stuart*, 635 So. 2d 61, 68 (Fla. App. 1994) (mobile park owners may not be required to buy homes for tenants or pay relocation costs where owners did not cause tenants' difficulties in finding suitable housing); *Golden Gate Hotel Ass'n* v. *San Francisco*, 864 F. Supp. 917, 927-928 (N.D. Cal. 1993) (requiring hotel owners to provide relocation assistance for displaced tenants was a taking because owners were not responsible for social ills of the homeless), vacated on other grounds, 18 F.3d 1482 (9th Cir. 1994).

In this case, the record is clear that Eastern did not cause, contribute to, or have any impact on the current funding problems plaguing the retiree benefit plans. To the

contrary, by establishing, upon its exit from the coal industry, an independent, fully-capitalized company—a company that subsequently met all its obligations to contribute to mineworker benefit funds—Eastern's actions, if anything, delayed the onset of the later crisis.

Nevertheless, the court of appeals fabricated causal threads where none exist. First, the court opined that Eastern "made an implicit commitment" to furnish lifetime retiree benefits by signing wage benefit agreements and making benefit contributions until the mid-1960s. Pet. App. 14. But those agreements did not guarantee lifetime benefits and, indeed, did not even guarantee any particular level of benefits for active miners. And Eastern's contributions never were attached to any promise, explicit or implicit, to provide lifetime benefits. Second, the court of appeals maintained that Eastern's contributions created "an expectation of lifetime health benefits" among miners, without which the pre-Coal Act method of funding benefits might not have been deemed inadequate. Pet. App. 22. But even if Eastern had contributed to such an expectation (and it is impossible to see how it could have done so given the limited nature of its promises), it makes no sense to blame the later funding crisis—lack of money to pay the retirees' medical bills—on what may subjectively have been in the retirees' minds. The court of appeals' attempt to find a causal link between Eastern's conduct and the retiree benefits funding crisis is unavailing.

B. The Three-Factor Analysis Used In Non-Categorical Takings Cases Shows That There Has Been A Taking

Although the lack of a causal relationship between the problem addressed by a government imposition and the conduct of the burdened party is a strong indicator that a taking has occurred, we do not suggest that this by itself is sufficient to establish a taking. Even absent a causal

connection, a government imposition may not be a taking if it is *de minimis* in economic impact, if it does not interfere with the burdened party's reasonable investment-backed expectations, or if the nature of the governmental action renders it constitutionally unproblematic (for example, because the imposition is a broad-based tax). See *Babbitt* v. *Youpee*, 117 S. Ct. 727, 731 (1997). None of these three factors assists respondents; each weighs in Eastern's favor.

Economic Impact. The $5 million already assessed against Eastern, and the $100 million-plus liability that Eastern faces in the future are, by any token, significant sums. See *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987) (taking of property interests valued at under $2,000 may have "substantial" economic impact because "[t]hese are not trivial sums"); *Youpee*, 117 S. Ct. at 733 (taking of property interest of $1,239 is enough to be "palpable"). Yet, the court of appeals found that this factor weighed against Eastern because its liability is "roughly proportionate to the expectation of health benefits that it created" and it has not suffered "the total deprivation of an asset." Pet. App. 20-21.

As demonstrated above, Eastern neither created nor contributed to any expectation that it would subsidize lifetime health benefits after it exited the coal industry in 1965, so there is not even the roughest proportionality between its liability and the purported expectation. And the Court's non-categorical takings test does not require an economic impact that *totally* deprives the owner of its property. See *Lucas*, 505 U.S. at 1019 n.8 (property owner who suffers less than total deprivation of property interest may have suffered a taking); *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). Especially in light of its unexpectedness, the $100 million liability facing Eastern is of constitutional proportions.

Reasonable Expectations. Eastern had every reason to expect that it was free of any coal retiree liability when it left the coal industry. It never had been party to a wage agreement that promised lifetime benefits to retirees, and it transferred all its coal operations and liabilities to an independent company, which has met and continues to meet all its legal obligations to retirees. In those circumstances, the fact that Eastern once employed coal miners gave it no reason to expect that it would be summoned to fund their retiree health benefits many decades later. Certainly, this Court would be surprised if a federal agency suddenly required it to fund lifetime health benefits for attorneys who were Supreme Court clerks decades ago, on the ground that the law firms they subsequently worked for no longer exist. Eastern reasonably expected no comparable liability to descend upon it.

The court of appeals, however, ruled that, because of the federal government's historical regulation of the mining industry, Eastern reasonably should have expected to provide lifetime health benefits for miners it long ago employed. Pet. App. 22. But that paints too broadly. The *general possibility* that Congress might at some point revise the means of funding coal retirees' health benefits is a far cry from the *specific expectation* that Congress would impose vast funding liability on a company that had long been out of the coal business and that never had committed itself to providing lifetime benefits. See *Preseault* v. *United States*, 100 F.3d 1525, 1537-1540 (Fed. Cir. 1996).

That distinction firmly separates this case from *Concrete Pipe*, on which the court below so heavily relied. The plaintiff employer in *Concrete Pipe* had joined the benefits plan *after* Congress made withdrawing employers liable for significant unfunded benefits and thus reasonably should have expected that it might be made liable for greater unfunded benefits. 508 U.S. at 645; see also *id.* at 649 (O'Connor, J.,

concurring) (noting that the Court did not decide whether an employer that joined a benefits plan *before* employers became subject to such liability would have "a strong constitutional challenge to retroactive withdrawal liability"). Eastern never provided coal retiree health benefits during any period when ex-employers could be made liable for lifetime benefits. Thus, unlike the employer in *Concrete Pipe*, Eastern had *no* notice and *no* expectation that the regulatory regime would change so dramatically and impose significant retroactive liability on long-gone employers.

The court of appeals' application of the "reasonable expectations" factor would permit the government to take an untrammeled and unbounded free shot at property owners who had ever been subject to governmental regulation. Indeed, there is no principled way to limit the long arm of this principle to the regulatory environment. *All* property owners know that Congress may change the law at any time. Does that mean that a retroactively applied imposition *cannot* amount to a compensable taking simply because all property owners are on notice that the law might change? If so, the concept of "reasonable expectations" will have been nullified, and the absence of a reliable legal framework will permit rent-seeking and lobbying to displace rational and democratic decisionmaking in our economy and polity. See 2 John Austin, *Lectures on Jurisprudence* § 1128, at 256-257 (Robert Campbell ed., 1875) ("whenever expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession * * * [is] pernicious"); Jeremy Bentham, *The Theory of Legislation* 111-112 (C.K. Ogden ed., 1931) (security in property consists of "receiving no check, no derangement to the expectation founded on the laws").

The societal costs of overthrowing the reasonable expectations of companies like Eastern are heavy. As

commentators have observed, property owners suffer "demoralization" when the government takes their property and hands it over to others—especially where the owners did not cause or contribute to the social problem targeted by the regulation. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1214 (1967). In such circumstances, property owners predictably will resist unfair government exactions, as this litigation attests, imposing significant costs on society as resources are diverted from investment and production into litigation and lobbying. And the court of appeals' obliteration of the reasonable expectations factor can only encourage strategic behavior among potential beneficiaries. In this case, the unions failed to secure lifetime health benefits at the time Eastern was party to the early coal wage agreements. Permitting the unions to secure those benefits from Eastern now through an after-the-fact governmental edict is bound to encourage others to seek desired benefits by relying on governmental largesse as opposed to their own initiative.

Nature of the Governmental Action. The court of appeals found that this factor weighed against Eastern because the $100 million exaction was not a physical invasion or permanent appropriation, but "merely a public program that readjusts economic burdens." Pet. App. 23. In addition, the court below found it significant that the funds to be paid by Eastern go to a private benefit fund, not to a government entity. *Ibid*. However, the Takings Clause is not limited "to outright acquisitions by the government for itself," but also extends to situations where "the Government has simply imposed a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982); see also *Lucas*, 505 U.S. at 1014 (rejecting outmoded notion that the Takings Clause reaches only a "direct appropriation" of property). And a public

program that readjusts economic burdens may be a taking if, as in this case, it "goes too far" and amounts to "a forced contribution" that "is not reasonably related" to the public purpose that the government asserts as its rationalization. *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 163 (1980).

Indeed, the governmental action in this case—imposing a $100 million charge on Eastern to cure a benefit shortfall that Eastern did nothing to produce—is truly extraordinary. Eastern, unlike so many other companies, did not orphan its miners when it exited the industry in the mid-1960s, instead establishing an independent corporation to continue mining coal and providing appropriate health benefits to its employees and retirees. And Eastern fully paid for the benefits it derived from the labor of its former employees decades ago, so that exacting additional payments now clearly is gratuitous and punitive. Yet, according to the government, this "good citizen" must pay for the misdeeds of others. This extraordinary conclusion further supports Eastern's takings claims. See *Irving*, 481 U.S. at 716 (finding a taking in part because the nature of the governmental action was "extraordinary"); *Youpee*, 117 S. Ct. at 733 (same).

Finally, this is not a situation where the choice is between making Eastern pay or allowing mine retirees and their dependents to suffer. Assuming the benefits are to be maintained, the real issue is whether Eastern and other super-reachback companies or the public at large should bear the cost of funding them. Eastern may not constitutionally be singled out to shoulder an effort to rescue the troubled health plans. If Congress wants those plans funded, Congress should appropriate the means to do so, not arbitrarily force such funding on Eastern. Reversing the decision below will permit the Takings Clause to continue to"stan[d] as a shield

against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

II. THE DUE PROCESS CLAUSE FORBIDS CONGRESS FROM REQUIRING EASTERN TO MAKE GOOD A BENEFIT SHORTFALL TO WHICH IT DID NOT CONTRIBUTE

The utterly toothless rationality review to which the First Circuit subjected the Coal Act's impositions on Eastern did not satisfy the demands of the Due Process Clause. There are two established principles at work in this case that mandate a harder look at ends and means that the Coal Act assessments against Eastern cannot possibly survive.

The first principle is that a central concern of the Due Process Clause is the protection of rights in private property. Judicial review of economic legislation thus may not be servile or perfunctory, as it was below. The second principle is that retroactive legislation imposes special burdens on affected parties and so requires stronger justification than prospective legislation. Fitting respect for these principles requires a heightened standard of review when government infringes property rights on the basis of conduct that occurred in the distant past. In such circumstances, the Due Process Clause at least demands that there be a direct causal link between the burdened parties' conduct and the problem addressed by the government imposition, and (where there is such a causal link) that the burdened parties' causal contribution be proportionate to the liability imposed. In this case, no such defense can be made of the massive retroactive benefits liability imposed on Eastern. There simply is no causal connection between Eastern's conduct prior to 1966 and the harm addressed by the Coal Act assessments.

A. The Due Process Clause Requires Meaningful Review Of Economic Legislation

Property rights were central to the Framers' understanding of the liberties secured by the Constitution: they supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990); see also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42-58 (1992). The Framers saw the protection of property rights as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). They recognized, in the words of John Adams, that "[p]roperty must be secured or liberty cannot exist." *Discourses on Davila*, quoted in Ely, *supra*, at 43. Knowing that "[g]overnment is instituted no less for protection of the property than of the persons of individuals" (*The Federalist No. 54*, *supra*, at 339 (James Madison)), the Framers deliberately sought, in the Due Process Clause, to shield interests in property—no less than in life and liberty—from government intrusion. See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946.

This Court, too, has long recognized that the protection of property rights is "a vital principle of republican institutions." *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 235-236 (1897). Finding that "the dichotomy between personal liberties and property rights is a false one," the Court has confirmed that "rights in property are basic civil rights." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Rights in property are not secondary to rights to liberty because, as the Court explained in *Lynch*, there is a "fundamental interdependence * * * between" them and "[n]either could have meaning without the other." *Ibid.*

The court of appeals brushed aside petitioner's due process challenge to the Coal Act by labeling the Act "purely

economic" legislation that "does not abridge fundamental rights." Pet. App. 10. But property rights clearly are "fundamental" within the ordinary meaning of that term. See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 415 (1995) ("[E]conomic rights are fundamental in terms of the importance attached to them by the framers, their role in the traditions and collective conscience that underlie our conceptions of ordered liberty, and their contribution to individual and societal well-being"). And even if property rights are not "fundamental" in the narrow legal sense that regulation infringing upon them is subject to the highest level of strict scrutiny—an issue that need not be addressed in this case—still they are of such importance that they may not constitutionally be destroyed without a much stronger justification than that demanded by the First Circuit in this case.

Heightened rationality review (at the least) is also appropriate because arbitrary and irrational law making is peculiarly likely to occur in the context of cost-shifting legislation. The political gains to be had by shifting properly public costs to a small group of private parties are obvious, especially when those targeted are, as in the case of large business entities, often relatively wealthy and unlikely to win public sympathy. For this reason, any "presumption of constitutionality" attaching to economic legislation (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) must be applied with special caution to cost-shifting laws. Characterizing a cost-shifting statute as "economic" provides no guarantee that its effects are benign or that it serves a proper purpose.

B. Retroactive Legislation Must Meet A Higher Standard Than Prospective Legislation

Not only do the Coal Act assessments against Eastern infringe upon the company's property rights, but they do so

retroactively, on the basis of Eastern's conduct three decades ago. Because of the special burdens that retroactive laws impose, this Court has recognized that more is required to justify retroactive than prospective legislation.

Simply put, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992). The Court has said that "[e]lementary considerations of fairness" weigh against retroactive legislation. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). Indeed, retroactive legislation "is contrary to fundamental notions of justice," for "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). The historical pedigree of the idea that retroactive laws present special problems of unfairness was surveyed by Justice Scalia in his concurring opinion in *Kaiser Aluminum* (*id.* at 855-856) and need not be repeated here. Suffice it to say that the concern is "centuries older than our Republic" (*Landgraf*, 511 U.S. at 265) and firmly rooted in American legal history as well as this Court's recent cases.[1/]

[1/] More than simple fairness underlies reservations about retroactive legislation. As the Court noted in *Landgraf*, "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." 511 U.S. at 265-266. The Court also showed that retroactive legislation poses special risks of the abuse of legislative power. *Id.* at 266-267 & n.20.

Because retroactive legislation presents these special problems, it "does have to meet a burden not faced by legislation that has only future effects" when challenged under the Due Process Clause. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). This Court has explained that "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 16-17.

The court of appeals bent language in *Gray* to justify its determination that the "rational basis standard" is the same for both retroactive and prospective economic legislation. Pet. App. 11-12. But rationality review covers a broad spectrum, from the sort of fleeting inquiry conducted by the First Circuit—one that does not meaningfully test the means used by government and that generally amounts to a rubber-stamp—to the heightened review that is routinely conducted in Equal Protection cases where important rights or sensitive classifications are in question. See Laurence H. Tribe, *American Constitutional Law* 1601-1618 (2d ed. 1988). When important property rights are infringed by a retroactive assessment of the type mandated by the Coal Act, heightened rationality review is the least that is constitutionally required.

C. The Court Should Require That Retroactive Cost-Shifting Legislation Meet A Causal Relationship Test

Basic elements of rationality-review-with-teeth are requirements that there be a causal relationship between the conduct of the burdened party and the problem addressed by the governmental action, and at least a rough proportionality between the size of the exaction and the responsibility of the burdened party.

This Court endorsed the causality requirement—the factor that is determinative in this case—in *Turner Elkhorn*, a decision that upheld the retroactive imposition of liability on mine operators for injuries and deaths related to black lung disease. The Court pointed out that if the statute had required compensation for injuries or deaths not causally connected to working in mines, it would have presented a different and much harder case. 428 U.S. at 24-26. The Court thus recognized that a burdened party's causal responsibility for the problems addressed by retroactive economic legislation is central to the evaluation of that legislation under the Due Process Clause. See also *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (in pension plan withdrawal case, "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility"); *Concrete Pipe & Prods.*, 508 U.S. at 647 (O'Connor, J., concurring).

As we have already noted, all of the cases upon which the court of appeals relied involved parties that created the problem addressed by the retroactive legislation. In *Concrete Pipe*, this Court explained that retroactive liability was justified because the employer had "contributed to the plan's probable liability by providing employees with service credits" that counted toward the vesting of benefits. 508 U.S. at 638. *Gray* upheld the application of the same law to employer withdrawals occurring before enactment of the statute. 467 U.S. at 728-731. And *Turner Elkhorn* involved employer liability for benefits due for injuries sustained as a result of working for the employer. In each of those cases, there was a direct causal link between the employer's conduct and the problem addressed by the retroactive statute.

It cannot be proper, in contrast, for the state retroactively to single out a small group of private parties to pay the

costs of remedying a problem not of their making. When the targeted parties played no causal role in creating the problem addressed, there is no justification for requiring them—rather than the responsible parties or the public at large—to bear the costs. The constitutional importance of property rights and the unfairness of retroactively imposing massive, unanticipated costs make such a lack of justification fatal. If due process is to be a meaningful protection, retroactive cost-shifting legislation is permissible only if the burdened party's conduct played a direct causal role in creating the problem addressed and thus in creating the need for funds.[2/]

Guided by this principle, the resolution of Eastern's due process claim is straightforward. Eastern did not cause or contribute to the retiree health benefits funding crisis addressed by the Coal Act. Nothing in the record supports the astonishing proposal that Eastern must pay $100 million

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[2/] We recognize that on several occasions this Court has upheld the retroactive application of tax statutes that may not satisfy this test. See *United States* v. *Carlton*, 512 U.S. 26, 30 (1994) (citing cases). Whatever the justification for retroactive tax laws, it cannot be extended to the Coal Act's super-reachback assessments. As the Court noted in *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981), retroactivity in tax laws is "a customary congressional practice" and has been "confined to short and limited periods required by the practicalities of producing national legislation." See also *Carlton*, 512 U.S. at 32 (relying on statute's "modest period of retroactivity" to find that it did not violate the Due Process Clause); *id.* at 38 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise * * * serious constitutional questions"). These tax statutes stand in sharp contrast to the retroactive provisions of the Coal Act, which are extremely unusual, could not have been anticipated, impose retroactive liability reaching back more than *thirty years,* and enjoy no special pragmatic justification.

the astonishing proposal that Eastern must pay $100 million for retirement benefits that it never promised to any worker. The imposition of retroactive liability against Eastern fails meaningful rational basis review and violates the Due Process Clause.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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